

SECTION IX.

Summary

The Idaho Transportation Department (ITD) must implement the Federal Disadvantaged Business Enterprise (DBE) Program in order to receive U.S. Department of Transportation (USDOT) funds. Recent legal decisions and guidance from USDOT have led ITD to reexamine how it implements the Program. This summary discusses:

- Data concerning the overall annual goal for DBE participation in federally-funded contracts;
- Information on how much of the annual goal can be achieved through neutral means; and
- Specific measures ITD should consider to implement the program.

Overall Annual DBE Goal

ITD must develop an overall annual goal for DBE participation whether or not it implements race- or gender-conscious programs, or just race- and gender-neutral measures. The Federal DBE Program calls for a “base figure analysis” and consideration of any “step 2” adjustments in deriving an overall annual goal for DBE participation in federally-funded contracts.

Base figure analysis. After considering type, contract role, location and size of work involved in federally-funded projects and the relative availability of firms to perform that work, BBC determined that 15.3 percent of dollars on federally-funded contracts would go to minority- and women-owned firms (MBE/WBEs) if available MBE/WBEs received the same amount of work as similarly-situated majority-owned firms. Methods for determining relative availability of minority- and women-owned firms for ITD work are described in Section II.

Some of the largest MBE/WBEs would not meet the federal eligibility requirements for DBE certification. As discussed in Section II, these firms account for nearly 4 percentage points of the overall 15.3 percent benchmark for MBE/WBE utilization on ITD contracts. After removing these firms from the set of potentially DBE-certified firms, the revised based figure analysis indicates a benchmark of 10.5 percent participation of firms potentially certified as DBEs.

Step 2 adjustments. ITD could consider adjustments in the base figure through a “step 2” process. BBC reviewed relevant types of information for a step 2 adjustment that are outlined in the Federal DBE Program. BBC’s review of the information suggests that any factors indicating downward adjustments in the base figure would be offset by factors indicating upward adjustments in the base figure. ITD may consider adopting 10.5 percent as its overall annual goal for DBE participation in federally-funded contracts (without any step 2 adjustments).

Preliminary Conclusions and Recommendations

The Federal DBE Program requires ITD to assess the percentage of its overall annual DBE goal that can be achieved through neutral means, and if necessary, the percentage to be achieved through race- and gender-conscious measures.

Evidence of disparities when ITD implements an all-neutral program. To help ITD make decisions on the extent to which it can implement the DBE Program solely through neutral means, BBC examined utilization of minority- and women-owned firms on past ITD contracts with and without DBE contract goals. The “without-goals” contracts include all state-funded contracts, as ITD has not implemented any race- or gender-conscious measures for non-federally-funded projects. They also include federally-funded contracts awarded after January 2006, when ITD discontinued setting DBE contract goals on these contracts.

Federally-funded contracts. From 2002 through 2006, minority- and women-owned firms (including firms not DBE certified) were awarded 13.1 percent of prime contract and subcontract dollars for federally-funded transportation construction and engineering contracts. This level of MBE/WBE utilization fell slightly below what would be expected based on overall analysis of MBE/WBEs available to perform that work (15.3 percent). However, about 12 percent of federally-funded contract dollars went to women-owned firms and 1 percent went to minority-owned firms. There were substantial disparities between utilization and availability for minority-owned firms (for each race/ethnic group) even for the time period with DBE contract goals in place.

When BBC examined only those federally-funded contracts after January 2006, MBE/WBE utilization was only 10.8 percent of contract dollars. This was substantially below the utilization expected based on MBE/WBE availability for these contracts and subcontracts.

State-funded contracts. MBE/WBE utilization on state-funded contracts from 2002 through 2006 was 14.6 percent, less than what would be expected based on MBE/WBE availability for these contracts (about 20 percent).

Overall results for subcontracting versus prime contracts. In general, BBC found that minority- and women-owned firms received a relatively large share of subcontract dollars on construction contracts whether or not DBE goals were in place. However, most of the subcontract volume went to white women-owned firms. There were disparities between actual utilization of minority-owned firms and what would be expected given MBE availability for these subcontracts.

For engineering-related subcontracts, utilization of minority- and women-owned firms was substantially below availability for these subcontracts.

BBC identified the largest disparities for construction and engineering prime contracts, even when just examining smaller contracts. The past DBE contract goals program focused on opening opportunities for subcontractors, not prime contractors.

Qualitative information. The study team collected and reviewed qualitative information from in-depth personal interviews conducted with minority-, women- and majority-owned firms across the state, from interviews with trade association representatives, from open-ended questions included in a large survey of local firms, and from public hearing testimony and written comments received after the preliminary disparity study report was published. This information helped to understand the disparities discussed above. There were some instances in which minority and female business owners reported that they were treated differently because of their race or gender. Many minority and female business owners identified disadvantages that were not directly related to race or gender of the firm owner.

BBC examined qualitative and quantitative information specific to construction subcontracts and prime contracts, and for engineering subcontracts and prime contracts. Specific research findings and possible remedies for ITD to consider are discussed below.

Conclusions and recommendations specific to construction subcontracting. Based on examination of subcontracting opportunities on ITD construction contracts, and review of qualitative information, BBC offers the following conclusions.

1. Several MBE/WBE subcontractors interviewed by the study team indicated a fear that they would not be solicited for subcontracting opportunities now that the old DBE contract goals program had been discontinued. A few subcontractors were concerned that primes would now self-perform work that they had previously subcontracted. Some of the subcontractors expressing these fears had not seen any decline in opportunities, however. The share of construction subcontracting dollars going to minority- and women-owned firms was greater on ITD projects without DBE goals than projects with goals. MBE/WBE utilization as a share of federally-funded subcontract dollars increased for February through December 2006. There was no evidence of disparities for white women-owned construction subcontractors without the DBE contract goals.
2. Utilization of minority-owned firms is relatively low regardless of whether or not DBE contract goals are applied. BBC identified disparities between utilization and availability across MBE groups.
3. Interviewees including white men indicated that a good old boy network existed in the Idaho transportation contracting industry. This may affect subcontracting opportunities for firms that are not part of this network, including some minority- and women-owned firms.
4. ITD has implemented a strong array of measures to encourage development of minority- and women-owned construction subcontractors and encourage participation in ITD projects. These efforts include publishing recommended levels of participation for DBEs for certain federally-funded construction contracts. BBC's review of ITD's contracting processes found that information on subcontracting opportunities was readily available to MBE/WBEs and majority-owned firms. There may be opportunities to further address barriers to MBE/WBE development and to further address potential bid shopping and late payments for subcontractors on ITD jobs.

In addition to continuing and strengthening its technical assistance efforts, ITD should consider the following recommendations for future remedies.

- a. It does not appear that reintroduction of the former DBE contract goals program is needed at this time. ITD may decide to continue to communicate anticipated levels of participation for ITD construction contracts. Because ITD introduced this practice in 2007, the utilization data examined by BBC (through December 2006) are not useful in determining any effect of this initiative.
- b. ITD should monitor both DBE and MBE/WBE utilization as subcontractors on both federally- and state-funded projects. This information is essential to gauge success of ITD's programs for subcontractors and whether or not reintroduction of DBE contract goals would be needed in the future.
- c. ITD should track MBE/WBE utilization by specific prime contractors obtaining a large dollar volume of ITD construction contracts. If needed, ITD can further investigate whether there are particular barriers to use of minority- and women-owned firms for individual prime contractors. ITD has the authority to ensure that its prime contractors are not discriminating against potential subcontractors based on subcontractors' race, ethnicity or gender.
- d. Mandatory pre-bid conferences for certain ITD contracts may provide a forum to introduce subcontractors to primes. (Perhaps hold a mandatory pre-bid conference in each region of the state at least once per year, and encourage subcontractors to attend.)
- e. ITD should automatically notify subcontractors of ITD payment of prime contractors.
- f. If ITD observes declines in subcontracting opportunities, it could consider setting minimum subcontracting requirements on specific projects.

Preliminary conclusions and recommendations for construction prime contracting.

Firms seeking to compete for ITD construction prime contracts face a different set of challenges than businesses that focus on subcontracting. BBC prepared the following preliminary conclusions and recommendations. (Note that the numbers and letters assigned to preliminary conclusions and possible remedies continue in sequence throughout Section IX.)

5. Overall, MBE/WBE utilization as prime contractors on ITD federally-funded construction projects is somewhat below what would be expected based on availability for these contracts. For state-funded contracts, there is a substantial disparity between utilization and availability of MBE/WBEs as prime contractors.
6. ITD widely informs potential prime contractors of opportunities to bid and has a relatively straightforward bidding process. Awards typically go to the lowest bidder.
7. Because of the time needed to build prime contractor capabilities, capital, bonding capacity and other resources, it may take longer to build strong MBE/WBE prime contractors than strong subcontractors. Race or gender discrimination that may have

occurred many decades ago could still affect the current availability and bid capacity of minority- and women-owned firms.

8. ITD has implemented efforts to encourage development of minority- and women-owned construction firms. However, ITD's past implementation of the Federal DBE Program has concentrated on participation of DBEs as subcontractors, only some of which have emerged as prime contractors.

In the future, ITD may need to devote more efforts to directly developing MBE/WBE prime contractors. ITD should consider the following potential remedies.

- g. Even though BBC's analysis found that ITD already has many small construction contracts and that disparities in MBE/WBE utilization remain on small contracts, ITD should attempt to further unbundle its large contracts to encourage bidding by smaller MBE/WBEs.
- h. ITD should continue and intensify its intensive technical assistance that introduces firms to prime contracting roles on ITD projects and builds strong MBE/WBE prime contractors capable of completing larger projects. Specialized assistance to reservation-based Native American-owned firms may be needed.
- i. ITD should consider identifying a limited number of small construction projects as joint venture "demonstration projects" for larger contractors teaming with small, emerging prime contractors. Bidding would be limited to joint venture partners.
- j. ITD can also encourage additional mentor-protégé efforts by Associated General Contractors, other associations and individual prime contractors.

Strong prime contractor development programs will be needed for many years in order to address the disparities identified in MBE/WBE participation as construction prime contractors. ITD should closely monitor MBE/WBE bidding and contract awards to gauge the success of these efforts, and assess whether race- or gender-based programs are needed in the future.

Preliminary conclusions and recommendations for engineering subconsulting. Based on information on engineering subcontracts, BBC provides the following preliminary conclusions and recommendations.

9. As with construction subcontractors, several MBE/WBE engineering subconsultants interviewed by the study team were concerned about limited opportunities for MBE/WBE subconsultants on ITD engineering-related contracts after ITD discontinued setting DBE contract goals. MBE/WBE utilization is relatively low for projects without DBE contract goals. Because ITD began including information on anticipated levels of DBE participation on RFPs after January 2007, BBC was unable to assess the impact of this initiative on MBE/WBE utilization. (BBC's analysis of ITD utilization extends through December 2006.)

10. The past DBE goals program and ITD's technical assistance efforts have assisted minority- and women-owned firms in breaking into subconsulting relationships with larger engineering firms (based on the study team's interviews with business owners).
11. Many businesses reported that it was difficult to identify potential subconsulting opportunities on ITD engineering work, especially for non-RFP work. Slow payment was also identified as an issue.

ITD should consider the following program elements related to engineering subconsulting (and as with other areas, strong technical assistance efforts should also continue).

- k. Develop systems to better identify and communicate ITD engineering opportunities in advance;
- l. Require prime consultants competing for certain term agreement categories to include subconsultants as part of a team submission (and encouraging DBE participation among subconsultants);
- m. Periodically hold mandatory pre-proposal conferences for RFPs where subconsultants can introduce themselves to prime consultants;
- n. On certain RFPs, set minimum percentages of work that prime consultants must subcontract out and encourage use of small businesses on these subcontracts; and
- o. Monitor individual prime's use of minority- and women-owned subconsultants on ITD work and further investigate certain prime consultants when warranted.
- p. Automatically inform subconsultants when prime consultants have been paid;

These recommendations are influenced by the results from BBC's analysis of MBE/WBE utilization as prime consultants on ITD engineering-related contracts. Although subconsulting on ITD contracts can be an important stepping stone to working directly with ITD, ITD's primary focus in encouraging MBE/WBE participation in engineering contracts should be as prime consultants not as subconsultants, where work volume is quite limited. This is one reason why ITD may not want to reintroduce the DBE contract goals program at this time. ITD may wish to continue reporting anticipated levels of DBE participation in its RFPs for engineering-related contracts.

Preliminary conclusions and recommendations for engineering prime contracts. Based on the information reviewed to date, BBC offers the following preliminary conclusions and recommendations concerning ITD engineering-related prime contracts.

12. Only 3 percent of prime consultant dollars on ITD engineering-related contracts goes to minority- and women-owned firms, substantially below what would be expected based on availability of MBEs and WBEs to perform this work. BBC identified large disparities for WBEs and each MBE group. The share of prime dollars going to MBE/WBEs is greater for small engineering-related contracts, but disparities still exist.

13. The process of selecting firms to conduct engineering-related work is subjective, however, ITD evaluations do not appear to unfairly disadvantage minority- and women-owned firms. A relatively large proportion of firms competing for term agreements were DBEs (11 and 13 percent for 2005 and 2007, respectively). Minority- and women-owned firms compete for fewer categories of ITD work under the term agreements. DBE firms competing for a category are about as likely to be successful as non-DBEs. Firms approved for term agreements still must market themselves within ITD in order to be chosen for task orders. This second step to obtaining work could be a barrier for firms without much experience with ITD. Minority- and women-owned firms are less likely to compete for contracts awarded through Requests for Proposals.
14. Several firms reported that it was difficult to learn of upcoming consulting opportunities at ITD.
15. A number of smaller firms indicated that it was difficult to compete for ITD work against large, established engineering firms that may operate nationally or internationally. This may be a growing concern as larger engineering firms may be competing with smaller firms for a declining volume of ITD engineering contracts.
16. ITD's past race- and gender-conscious programs related to engineering contractors primarily focused on subcontracting opportunities for DBEs. In the future, ITD may need to devote more efforts to directly developing MBE/WBE prime consultants.

ITD should consider the following initiatives:

- q. ITD could provide intensive technical assistance to encourage proposals for term agreement proposals from minority- and women-owned firms. ITD could also work with MBE/WBE firms to improve the quality of their proposals.
- r. In the scoring of proposals for term agreements and RFPs, ITD could award points for firms that have not been successful in competing for a type of work (or term agreement category) in the past.
- s. As presented under the preliminary recommendations specific to subconsulting on engineer-related contracts, ITD could consider pre-qualifying teams of firms for particular categories of work awarded under term agreements so that smaller firms could leverage their capabilities through proposed team members.

General outreach and technical assistance. As discussed above, ITD should continue and expand upon its current efforts to build capabilities of minority- and women-owned firms. BBC recommends multiple tiers of assistance depending upon the age, size, line of work and other business factors to make assistance most useful for firms in different stages of development. Specialized assistance to reservation-based Native American-owned firms may be needed.

Overall Comments

ITD will need strong programs to remove barriers to MBE and WBE participation as prime contractors and must continue its efforts to open subcontracting opportunities. The Department can build on its past success in developing innovative programs.

No recommendation to reintroduce DBE contract goals. Reintroduction of the DBE contract goals program is not recommended at this time. This should not imply an end to ITD's efforts to build a successful MBE/WBE contracting community. It does mean a new direction for ITD's implementation of the Federal DBE Program that will require time and resources to be successful.

Over-concentration of DBEs in certain fields. BBC examined the issue of over-concentration of DBEs in certain fields per 49 CFR Part 26.33. BBC identified highway striping as one possible area of over-concentration. BBC reaches this determination because all of the firms successfully interviewed within this specialization are MBE/WBEs. However, ITD's current technical assistance efforts and those described above may effectively respond to the provisions of 49 CFR Part 26.33. Because ITD has discontinued its use of DBE contract goals, ITD does not need to incorporate any special provisions into use of these goals to account for potential over-concentration of DBEs.

Setting a specific percentage of overall annual DBE goal for FHWA projects to be met through neutral means. The Federal DBE Program requires ITD to meet the maximum feasible portion of its overall annual goal by using race-neutral means of facilitating DBE participation. However, some targeted efforts toward DBEs may be needed. BBC recommends that ITD consider meeting all or nearly all of its overall annual DBE goal through neutral means.

FTA and FAA programs. There are very few FTA- and FAA-funded contracts administered by ITD. BBC could not perform the types of analyses presented here for FHWA-funded contracts. BBC could not make an independent assessment of the overall goal for DBE participation in FTA- and FAA-funded projects. Because of the very small number of contracts, BBC recommends that ITD adopt the overall goals for DBE participation that USDOT has set for the nation for FTA- and FAA-funded contracts, and continue to operate all-neutral programs for these contracts.